Administrative Law

A Context and Practice Casebook

Second Edition

2023 Supplement

Richard Henry Seamon
Professor of Law
University of Idaho College of Law

Carolina Academic Press
Durham, North Carolina

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Contents

CASES

STATUTES

Introduction to 2023 Supplement

This supplement covers the period from July 2019, when the course book went to press, through July 2023, when this update was under preparation. I welcome your feedback on this supplement or the course book. Please send it to me at richard@uidaho.edu. Thank you.

Chapter 1

1. Welcome to Administrative Law!

B. What Are Administrative Agencies?

1. Administrative Agencies in the Everyday Sense

p. 7:

At the end of the paragraph beginning "One set of non-cabinet-level federal agencies . . .," please insert this sentence:

While independent agencies enjoy some independence from the President, the U.S. Constitution's separation-of-powers doctrine limits Congress's ability to insulate the heads of those agencies from presidential control. *See Collins v. Yellen*, 141 S. Ct. 1761, 1783–1787 (2021) (relying on *Seila Law, LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2195–2197 (2020), to invalidate, on separation of powers grounds, statutory restriction on President's power to remove the single Director who heads independent regulatory agency). Thus, their independence is relative, not absolute.

Chapter 2

2. Administrative Law Problem Solving

B. Sources of Agency Power

p. 30:

About three-quarters of the way down the page, after the citation to *Oklahoma v. U.S. Civil Serv. Comm'n*, please add another citation:

Accord Fed. Election Comm'n v. Cruz, 142 S. Ct. 1638, 1649–1650 (2022).

Chapter 5

5. Administrative Law, Federal Supremacy, and Cooperative Federalism

---

B. When Must Federal Agencies and Officials Obey State and Local Law?

1. Federal Agencies and Officials Must Obey a State or Local Law If that Law Does Not Meaningfully Interfere with the Execution of Federal Law and Is Not Preempted by Federal Law.

b. Preemption of State and Local Law by Federal Statutes and Regulations

p. 110:

At the end of the first full paragraph, which begins "An administrative law case illustrating preemption. . .", please add this citation:

Cf. Glacier Northwest, Inc. v. Int'l Bhd. of Teamsters Local Union No. 174, 143 S. Ct. 1404, 1412–15 (2023) (holding that state tort claims arising from destruction of employer property related to labor dispute were not preempted by National Labor Relations Act).

Chapter 8

8. Agency Rulemaking Power

B. The Delegation Doctrine as a Limit on Federal Statutes Granting Agencies Power to Make Legislative Rules

2. Modern Federal Delegation Doctrine

p. 164:

At the end of the fourth full paragraph—beginning "The 1935 cases of *Panama Refining* and *Schechter Poultry* . . ."—please insert this sentence:

For a recent lower court decision finding a violation of the nondelegation doctrine, see *Jarkesy v. SEC*, 34 F.4th 446, 459–463 (5th Cir. 2022) (holding that federal statutory provision violated nondelegation doctrine by delegating to SEC the unfettered right to choose whether to bring enforcement proceeding within the agency or in federal court), *cert. granted*, 143 S. Ct. 2688 (2023). The Court's grant of certiorari in *Jarkesy* may produce a majority decision on the nondelegation doctrine, which the Court in *Gundy* did not achieve.

4. Delegation of Power to Private Entities

p. 173:

At the end of the second full paragraph, which begins, "The leading case on federal statutes delegating powers to private entities . . .", please add these citations:

Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869 (5th Cir. 2022) (relying on *Carter Coal*, among other cases, to hold that a federal statute, the Horseracing Integrity and Safety Act (HISA), unconstitutionally delegates rulemaking power to private entity called the Horseracing Integrity and Safety Authority); *see also Oklahoma v. United States*, 62 F.4th 221, 228–233 (6th Cir. 2023) (holding that congressional amendment to HISA cured the nondelegation problem found by Fifth Circuit).

Also on page 173, please add this citation at the end of the third full paragraph, which

begins, "The Due Process Clause does not forbid *all* private participation . . .":

Consumers' Research v. FCC. 67 F.4th 773, 795–97 (6th Cir. 2023) (relying on *Sunshine Anthracite Coal*, among other cases, to find "no private-delegation doctrine violation" in federal statute authorizing private entity, Universal Service Administrative Company, to have input on FCC rulemaking).

Chapter 9

9. Limits on Agency Rulemaking Power

A. Internal Limits on Agency Rulemaking Power

1. Internal Substantive Limits

a. Internal Substantive Limits on Agency Power to Make Legislative Rules

p. 182:

Above the center-justified asterisks, please insert these additional case summaries:

- *American Hospital Ass'n v. Becerra*, 142 S. Ct. 1896 (2022)

The federal Medicare laws authorize the U.S. Department of Health and Human Services (HHS) to set reimbursement rates for the prescription drugs that hospitals give to outpatients. The laws prescribe two options for setting reimbursement rates. Option 1 lets HHS "vary" reimbursement rates for different groups of hospitals, an option that allows HHS, for example, to set lower reimbursement rates for hospitals that acquire their prescription drugs at lower costs. To use Option 1, however, HHS must survey hospitals to see how much they actually pay to acquire the prescription drugs. Option 2 requires HHS to set reimbursement rates based on the average price charged by the drug manufacturers, but permits HHS to "adjust[]" those rates. The laws governing Option 2 don't expressly authorize HHS to vary rates by hospital groups.

For many years, HHS used Option 2 to establish reimbursement rates that didn't vary by hospital group. Starting in 2018, however, HHS changed its tune; it began using Option 2 to vary reimbursement rates by hospital group. The Court held that HHS lacked authority to do this. The Court interpreted the Medicare laws to allow HHS to vary reimbursement rates by hospital group only if it used Option 1, which required a survey of the hospitals' acquisition costs. The Court explained that this survey "protects all hospitals by imposing an important procedural prerequisite—namely, a survey of hospitals' acquisition costs for prescription drugs—before HHS may target particular groups of hospitals for lower reimbursement rates."

- *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*, 142 S. Ct. 661 (2022) (per curiam)

During the COVID-19 pandemic, the President ordered the Occupational Safety and Health Administration to require all employers with at least 100 employees to require their employees to

get COVID vaccines. On review of a lower court's refusal to stay this vaccine mandate, which was a "rule" for APA purposes, the Court held that the employers challenging the mandate were "likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate." 142 S. Ct. at 664–665. Applying the "major questions doctrine" discussed later in this supplement, the Court examined the federal statutory provisions to see if they contained "clear" congressional authorization for such a significant rule. The Court found no such clear authorization.

P.S. In another case involving a different vaccine mandate (for health care workers at facilities that received Medicare or Medicaid dollars), which was issued under different federal laws, the Court that the rule establishing that mandate "falls within the authorities that Congress has conferred upon" the agency. *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam).

- *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021) (per curiam)

During the COVID-19 pandemic, the Director of the Centers for Disease Control and Prevention (CDC) issued a rule that generally barred landlords from evicting tenants from residential housing if the tenants couldn't pay their rent because of COVID. While the legal challenge to this nationwide moratorium on evictions was pending, the Court held that the challengers were certain to succeed in showing that the moratorium exceeded the CDC's authority. The CDC relied on the Public Health Services Act of 1944 (PHSA) and, in particular, on a provision authorizing the CDC to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." 42 U.S.C. § 264(a). The Court held that this language was too "wafer-thin" a "reed" on which to "rest such sweeping power" as the CDC asserted in that case. 141 S. Ct. at 2489.

- *Biden v. Nebraska*, 143 S. Ct. 2355 (2023)

At the President's direction, the Secretary of Education created a program (in a set of legislative rules) that would enable 20 million people to have their federal student loans wholly or partly forgiven—i.e., erased. The Secretary claimed that the loan forgiveness program was authorized by a statute that permits him to "waive or modify" any statutory provision in Title IV of the Education Act if he "deems" the waiver or modification "necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a). The Court rejected that claim of authority, holding that the loan-forgiveness program was more than a waiver or modification of Title IV; it "rewr[o]te the statute from the ground up." *Biden*, 143 S. Ct. at 2368. In so holding, the Court relied partly on a case cited in the course book, *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994). In the *MCI* case, the Court had said that a statutory provision authorizing an agency to "modify" other statutory provisions "'does not authorize' basic and fundamental changes in the scheme designed by Congress.'" *Biden*, 143 S. Ct. at 2368 (quoting *MCI*, 512 U.S. at 225). The Court in *Biden* also relied on the "major questions doctrine" that it had outlined in *West Virgnia v. EPA,* 142 S. Ct. 2587 (2022), excerpted later in this supplement. Applied here, the major questions doctrine required the Secretary of Education to show "clear congressional authorization" for the loan forgiveness program, a

requirement that he could not meet. *Id*. at 2375 (quoting *West Virginia v. EPA*. 142 S. Ct. at 2614 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014), summarized above in this supplement)).

B. External Limits on Agency Rulemaking Power

1. Constitutional Law

a. Substantive Limits

p. 185:

At the end of the paragraph. please insert this citation:

See also Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072–2074 (2021) (holding that California regulation violated the Just Compensation Clause by giving labor unions uncompensated right to go onto privately owned agricultural land to solicit union support).

Chapter 12

12. Informal Rulemaking

C. The Federal Agency Publishes General Notice of Proposed Rulemaking

1. The Purposes and Express Requirements of APA § 553(b)

p. 259:

At the very bottom of p. 259, please add this short paragraph:

Besides the three required pieces of information described above, Congress added a fourth required piece of information in a recent amendment to § 553(b). As amended, the agency must also give "the Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language." Pub. L. No. 118-9, § 2 (July 25, 2023). It will be interesting to see how soon we will see lawsuits challenging the adequacy of these summaries, brought perhaps by people who lack the patience (and who can blame them?) to read proposed rules in their entirety.

C. The Federal Agency Considers Public Input on the Proposed Rule and Other Relevant Matters When Deciding on the Final Rule

1. What Is "[R]elevant"?

p. 278:

At the end of the second paragraph of this subsection, please insert this citation:

See, *e.g.*, *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 595 (D.C. Cir. 2022) (stating that agency must show that it "reasonably considered the relevant issues and factors, particularly those expressly mandated by statute.") (internal quotation marks omitted).

D. The Federal Agency Publishes the Final Rule Along with a Concise General Statement of Its Basis and Purpose

2. Concise General Statement

f. The Agency Must Explain Any "Change in Course"

p. 296:

After the first full paragraph, which begins "The Court agreed . . .", please add this new paragraph:

The Court cited *Encino Motorcars* in a more recent case involving an agency's failure to consider reliance interests when changing course: *Department of Homeland Security v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891 (2020) (*DHS v. Regents*), which is excerpted later in this supplement. *DHS v. Regents* concerned the rescission of a program known as "DACA," which stands for Deferred Action for Childhood Arrivals. The DACA program "allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal." *Id.* at 1901. In 2017, DHS rescinded the agency memorandum establishing DACA, thereby rescinding the DACA program itself, but the U.S. Supreme Court held that the rescission was arbitrary and capricious. Quoting *Encino Motorcars*, the Court said, "When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913 (internal quotation marks and citation omitted). But DHS "ignored" the reliance interests of people who had received forbearance under DACA. *Id*. On remand, the Court made clear, DHS had to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915.

On remand, however, DHS did not try to rescind DACA again. As of the date of this supplement, DACA's status is complicated. In brief, people who got forbearance from removal under the DACA program continue to enjoy the benefits of DACA status and can get that status renewed. But a lawsuit challenging the 2012 program prevents DHS from processing initial requests for DACA status received after October 2022. DACA's ultimate fate remains uncertain.

Chapter 17

17. Introduction to Agency Adjudication

E. The Distinction between the Agency as Adjudicator and the Agency as Litigant

1. Court Adjudications Not Preceded by an Agency Adjudication

a. The Agency as Plaintiff

p. 381:

In the fourth paragraph—which begins "An agency also may have to go initially to court . . ."—please insert this citation at the end of the paragraph:

Cf. AMG Capital Mg't., LLC v. Federal Trade Comm'n, 141 S. Ct. 1341, 1347–1352 (2021) (holding that FTC lacked authority under agency statute to go directly into court to recover equitable monetary relief like restitution or disgorgement; Court relied partly on other statutory provisions authorizing FTC to seek monetary relief in court following administrative proceedings).

Chapter 18

18. Agency Adjudicatory Power

C. Federal Constitutional Restrictions on Statutory Grants of Adjudicatory Power to Federal Agencies

2. Historical U.S. Supreme Court Case Law

a. Public Rights

p. 400:

In the carryover paragraph, please insert this citation after the citation to *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review* Comm'n, 430 U.S. 442 (1977):

But cf. Jarkesy v. SEC. 34 F.4th 446, 451–459 (5th Cir. 2022) (holding that private rights, not public rights, were involved in SEC's administrative proceeding charging Mr. Jarkesy with fraud in violation of federal securities statute, and that the proceeding violated his 7th Amendment to a jury trial), *cert. granted*, 143 S. Ct. 2688 (2023).

3. Modern Federal Law on Adjudicatory Delegations

b. Seventh Amendment Limits

p. 407:

At the end of the paragraph that begins "In *Atlas Roofing* and a later case . . .," please add this (admittedly repetitive) citation:

Cf. Jarkesy v. SEC, 34 F.4th 446, 451–459 (5th Cir. 2022) (holding that private rights, not public rights, were involved in SEC's administrative proceeding charging Mr. Jarkesy with fraud in violation of federal securities statute, and that the proceeding violated his 7th Amendment to a jury trial), *cert. granted*, 143 S. Ct. 2688 (2023).

Chapter 19

19. Limits on Agency Adjudicatory Power

A. Internal Limits on Agency Adjudicatory Power

2. Internal Substantive Limits

p. 415:

Please add another case summary after *Greater Missouri Medical Pro-Care Providers*:

- *Sackett v. EPA*, 143 S. Ct. 1322 (2023)

Stick with us here: The Court in this case reversed an adjudicatory decision that rested on a legislative rule that conflicted with the statute that the rule was supposed to implement.

The EPA determined that Mr. and Ms. Sacketts' property had a wetland on it that the Sacketts had disturbed in violation of the Clean Water Act (CWA). The EPA issued a compliance order against them requiring them to restore the wetland or face big civil penalties. In 2012, the U.S. Supreme Court held that the EPA compliance order against the Sacketts was "final agency action" subject to judicial review under the federal APA. *See Sackett v. EPA*, 566 U.S. 120, 126–31 (2012), discussed in Exercise on p. 669 of course book).

In 2023, the Court held that the EPA compliance order rested on a legislative rule—namely, a rule defining the CWA term "waters of the United States"—that violated the CWA. The Court held that "the CWA "extends to only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that they are indistinguishable from those waters." 143 S. Ct. at 1344 (most internal quotations omitted). The purported wetland on the Sacketts' property was "distinguishable from any possibly covered waters."

The Court's opinion invalidated not only the EPA compliance order against the Sacketts but also the legislative rule on which the order rested. Thus, EPA must wade back into the murky "waters of the United States" phrase in the CWA.

Chapter 20

20. The Due Process Clauses as Source of Procedural Requirements for Agency Adjudications

---

D. Question Two: If Due Process Applies, What Process Is Due?

3. An Unbiased Decision Maker

b. Significance of *Withrow v. Larkin*

p. 456:

At the end of the first full paragraph—which begins "That final holding . . ."—please insert this citation:

Cf. Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 968 F.3d 1156, 1167–1168 (10th Cir. 2020) (relying on *Withrow* to hold that due process was not violated by fact that Commission adjudicated a matter involving a product while holding a rulemaking about the same product).

Chapter 28

28. Jurisdiction

C. Jurisdiction: Standing Requirements in Federal Court

1. Constitutional (Article III) Standing Requirements

a. Injury in Fact

P. 633:

At the very bottom of the page, please add this citation at the end of the paragraph:

See United States v. Texas, 143 S. Ct. 1964 (2023) (holding that States of Texas and Louisiana lacked standing to challenge federal immigration guidelines setting priorities for removal of foreign nationals present in the United States without lawful authorization).

p. 636:

In subsection a's first paragraph, please add this citation at the end of that paragraph:

See also TransUnion v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (explaining that concrete-harm requirement can't be satisfied merely by showing defendant violated statutory requirements enforceable through private actions; courts must "ask[] whether plaintiffs have identified a close historical or common-law analogue for their asserted injury").

p. 638:

Please add this at the end of the first full paragraph:

See also Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021) (holding that plaintiff had standing to seek nominal damages for public college's violation of his First Amendment rights, even though injunctive relief for the completed violation was no longer available and he did not seek compensatory damages).

Chapter 29

29. Cause of Action

D. Preclusion of Review

1. Presumption of Reviewability

a. Federal Law

p. 666:

In the first paragraph, after the first sentence's citation to *Mach Mining*, please add this citation after the "*see also*" signal:

Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022).

2. Preclusion of Judicial Challenges to Agency Action

a. Federal Law

(ii) Statutory Preclusion

p. 669:

After the carryover paragraph, please insert this summary of one recent case in which the U.S. Supreme Court held that a federal statute precluded review of agency action and another recent case in which the Court held that a special review statute did not preclude federal-question jurisdiction over a constitutional challenge.

- *Patel v. Garland*, 142 S. Ct. 1614 (2022)

Mr. and Ms. Patel entered the United States illegally and later applied under federal law for a form of relief from removal known as "discretionary adjustment of status." That relief would have made them lawful permanent residents. The United States Custom and Immigration Service (USCIS) denied the relief because Mr. Patel had falsely stated on a driver's license application that he was a U.S. citizen. When the federal government later sought to remove the Patels based on

their illegal entry, Mr. Patel re-applied for discretionary adjustment of status and argued to an Immigration Judge that he put the false information on his driver's license application by mistake. The Immigration Judge and the Board of Immigration Appeals rejected his application, after which he sought judicial review.

The issue before the Court was whether judicial review was statutorily precluded. The Court said yes. The relevant statutory provision generally prohibits judicial review of "any judgment regarding the granting of relief." 8 U.S.C. § 1255(a)(2)(B)(i). The Patels argued that the word "judgment" did not preclude judicial review of factual findings by the agency—referring, here, to findings about whether Mr. Patel deliberately lied about his citizenship on the driver's license application or just made a mistake. The Court held that the term "judgment" in the statute included factual findings; therefore, judicial review was precluded.

- *Axon Enterprise, Inc. v. Federal Trade Comm'n*, 143 S. Ct. 890 (2023)

The Federal Trade Commission (FTC) started administrative enforcement proceedings against two different entities, one of which was Axon Enterprises. While the FTC proceeding against Axon was pending, Axon sued in federal district court, invoking federal question jurisdiction and arguing that the proceeding was conducted under statutory provisions that violated the separation of powers. The FTC argued, however, that the district court lacked subject matter jurisdiction over Axon's constitutional challenge; jurisdiction was precluded, the FTC maintained, by a special review statute authorizing judicial review of FTC adjudicatory decisions in the federal courts of appeals. The Court rejected that argument and upheld the district court's jurisdiction to hear Axon's constitutional challenge. It held that the challenge was not the type of challenge that Congress intended to assign exclusively to the federal courts of appeals.

Chapter 30

30. Timing

A. Finality

2. The General Framework for Determining If an Agency Action Is Final

p. 680:

In the first paragraph, right after the citation to *Hawkes*, please add this citation:

See also Salinas v. U.S. Railroad Retirement Bd., 141 S. Ct. 691, 697 (2021) (stating same two-part test for finality).

3. Recurring Situations Raising Finality Issues

c. Finality of Agency Advice Letters and Guidance Documents

p. 685:

At the end of the first full paragraph—which begins "The divided opinion in *Soundboard* . . ."—please add this citation:

See also POET Biorefining, LLC v. EPA, 970 F.3d 392, 404–405 (D.C. Cir. 2020) (citing *Soundboard* in analyzing finality of EPA Guidance under special review statute limiting judicial review of "final action" by EPA).

C. Exhaustion

1. The Traditional Exhaustion Doctrine and Statutory Alteration of It

p. 700:

At the end of the carryover paragraph, please add this citation:

See also Luna Perez v. Sturgis Pub. Sch., 598 U.S. 142 (2023) (exhaustion provision in the Individuals with Disabilities Education Act (IDEA) did not bar lawsuit seeking damages under the Americans with Disabilities Act because damages were not available under the IDEA).

3. Issue Exhaustion

p. 704:

At the end of the first paragraph. please insert this citation:

See also Carr v. Saul, 141 S. Ct. 1352 (2021) (extending rationale of *Sims*, which refused to apply issue-exhaustion requirement to SSA Appeals Council proceedings, to SSA proceedings before an ALJ).

Chapter 33

33. The "Arbitrary and Capricious" Standard

B. What Does the Arbitrary and Capricious Standard Mean?

p. 753:

At the bottom of the page, we present five requirements for agency action to satisfy the "arbitrary and capricious" standard of review. The first of the requirements has been described in a recent U.S. Supreme Court case as requiring that "agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

C. Leading Cases on the Arbitrary and Capricious Standard

p. 754:

The first paragraph of section C refers to "three leading" cases on the A&C standard. The Court in 2020 decided a fourth such case, which we excerpt below, following a shortened excerpt of *Department of Commerce v. New York*.

p. 759:

At the very bottom of page 759, please add a citation at the end of the sentence that reads, "The 'administrative record' consists of all material on which the agency based its action."

But cf. Blue Mtns. Diversity Project v. Jeffries, 72 F.4th 991, 996 (9th Cir. 2023) (joining the D.C. Circuit in holding that agency's deliberative materials are generally not part of the administrative record that must be produced for judicial review, "absent impropriety or bad faith by the agency") (citing *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019)).

3. Department of Commerce v. New York

a. The *Department of Commerce* Opinion

pp. 775–784:

First, please forgive the major typo in subheading 33.C.3, and in the Exercise on p. 774, which misidentify the respondent: It should be New York, not the United States.

Second, please replace the excerpt on pp. 775–784 with the following excerpt, which I've shortened to make room for an excerpt of a 2020 decision by the U.S. Supreme Court on A&C standard.

Department of Commerce v. New York

139 S. Ct. 2551 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Secretary of Commerce decided to reinstate a question about citizenship on the 2020 census questionnaire. A group of plaintiffs challenged that decision. . . .

I

A

. . . [T]o apportion Members of the House of Representatives among the States, the Constitution requires an "Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct." Art. I, §2, cl. 3; Amdt. 14, §2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census "in such form and content as he may determine." 13 U. S. C. §141(a). The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce. See §§2, 21.

The population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States and to draw electoral districts. . . . [The census has long been used also to gather demographic data on matters like people's age, education, citizenship, and income level.] . . .

There have been 23 decennial censuses from the first census in 1790 to the most recent in 2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. . . . [To encourage people to complete the census, the Census Bureau eventually developed two versions, a short form that everyone got and that didn't ask about citizenship, and a long form that only some households got and that had many demographic questions, including about citizenship. The 2010 census questionnaire omitted a question about citizenship and almost all other questions seeking demographic information, leaving them questions instead for a different form, the American Community Survey (ACS), which was sent to about 2.6% of households.] . . .

The Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage noncitizens from responding to the census and lead to a less accurate count of the total population. . . .

B

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire. The Secretary stated that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (or VRA). . . . DOJ . . . formally requested reinstatement of the citizenship question on the census questionnaire. . . .

The Secretary's memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action. [The memo said that the Secretary eventually settled on an approach that blended (1) the Census Bureau's preferred approach, which was to use the ACS data and develop a model for determining citizenship on a census-block level, and (2) the Secretary's preferred approach, which included the citizenship question on the census itself.] . . .

The Secretary "carefully considered" the possibility that reinstating a citizenship question would depress the response rate. But after evaluating the Bureau's "limited empirical evidence" on the question—evidence drawn from estimated non-response rates to previous American Community Surveys and census questionnaires—the Secretary concluded that it was not possible to "determine definitively" whether inquiring about citizenship in the census would materially affect response rates. . . .

C

Shortly after the Secretary announced his decision, two groups of plaintiffs filed suit in Federal District Court in New York, challenging the decision on several grounds. The first group of plaintiffs included 18 States, the District of Columbia, various counties and cities, and the United States Conference of Mayors. . . . The second group of plaintiffs consisted of several non-governmental organizations that work with immigrant and minority communities. . . . [These plaintiffs—who are respondents in the U.S. Supreme Court—alleged violations of the Enumeration Clause and the federal APA, among other claims.] . . .

In June 2018, the Government submitted to the District Court the Commerce Department's "administrative record": the materials that Secretary Ross considered in making his decision. That record included DOJ's December 2017 letter requesting reinstatement of the citizenship question, as well as several memos from the Census Bureau analyzing the predicted effects of reinstating the question. Shortly thereafter, at DOJ's urging, the Government supplemented the record with a new memo from the Secretary, "intended to provide further background and context regarding" his March 2018 memo. The supplemental memo stated that the Secretary had begun considering whether to add the citizenship question in early 2017, and had inquired whether DOJ "would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." According to the Secretary, DOJ "formally" requested reinstatement of the citizenship question after that inquiry.

Respondents argued that the supplemental memo indicated that the Government had submitted an incomplete record of the materials considered by the Secretary. . . . [The district court granted respondents' motion to order the government to complete the record, and] the parties jointly stipulated to the inclusion of more than 12,000 pages of additional materials in the administrative record. Among those materials were emails and other records confirming that the Secretary and his staff began exploring the possibility of reinstating a citizenship question shortly after he was confirmed in early 2017, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to request reinstatement of the question for VRA

enforcement purposes.

In addition, respondents asked the court to authorize discovery outside the administrative record. They claimed that such an unusual step was warranted because they had made a strong preliminary showing that the Secretary had acted in bad faith. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The court also granted that request, authorizing expert discovery and depositions of certain DOJ and Commerce Department officials.

In August and September 2018, the District Court issued orders compelling depositions of Secretary Ross and of the Acting Assistant Attorney General for DOJ's Civil Rights Division. We granted the Government's request to stay the Secretary's deposition pending further review, but we declined to stay the Acting AAG's deposition or the other extra-record discovery that the District Court had authorized.

The District Court held a bench trial and . . . ruled that the Secretary's action was arbitrary and capricious, based on a pretextual rationale, and violated certain provisions of the Census Act.. . . [The government appealed to the Second Circuit and also petitioned the U.S. Supreme Court to grant certiorari before the Second Circuit decided the appeal. The Court granted the petition and accordingly the case skipped over the Second Circuit and went directly to the Court.]

II

[The Court held that at least some of the plaintiffs had Article III standing.]

III

The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary's decision. The text of that clause "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and Congress "has delegated its broad authority over the census to the Secretary." [Quoting *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996).] . . .

In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. . . .

IV

A

. . . The Government . . . argues that the Secretary's decision was not judicially reviewable under the Administrative Procedure Act in the first place [because, under APA § 701(a)(2), it is "committed to agency discretion by law."] . . .

We disagree. . . .

B

At the heart of this suit is respondents' claim that the Secretary abused his discretion in deciding to reinstate a citizenship question. We review the Secretary's exercise of discretion under the deferential "arbitrary and capricious" standard. See 5 U. S. C. §706(2)(A). . . .

. . . As the Bureau acknowledged, each approach—using administrative records alone, or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau's estimates. With a citizenship question, there would also

be some erroneous self-responses (about 500,000) and some conflicts between responses and administrative record data (about 9.5 million).

. . . The Secretary opted . . . for the approach that would yield a more complete set of data at an acceptable rate of accuracy, and would require estimating the citizenship of fewer people.

. . . [T]he choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision. In overriding that reasonable exercise of discretion, the [district] court improperly substituted its judgment for that of the agency. . . .

V

We now consider the District Court's determination that the Secretary's decision must be set aside because it rested on a pretextual basis, which the Government conceded below would warrant a remand to the agency.

We start with settled propositions. First, in order to permit meaningful judicial review, an agency must "disclose the basis" of its action. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–169 (1962); see also *SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.").

Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*., 435 U.S. 519, 549 (1978). That principle reflects the recognition that further judicial inquiry into "executive motivation" represents "a substantial intrusion" into the workings of another branch of Government and should normally be avoided. [S]ee *Overton Park*, 401 U.S. at 420.

Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons. See *Jagers v. Federal Crop Ins. Corp*., 758 F.3d 1179, 1185–1186 (CA10 2014). . . . Relatedly, a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. . . . Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).

Finally, we have recognized a narrow exception to the general rule against inquiring into "the mental processes of administrative decisionmakers." *Overton Park*, 401 U.S. at 420. On a "strong showing of bad faith or improper behavior," such an inquiry may be warranted and may justify extra-record discovery. *Ibid.*

The District Court invoked that exception in ordering extra-record discovery here. . . .

We agree with the Government that the District Court should not have ordered extra-record discovery when it did. At that time, the most that was warranted was the order to complete the administrative record. But the new material that the parties stipulated should have been part of the administrative record—which showed, among other things, that the VRA played an insignificant role in the decisionmaking process—largely justified such extra-record discovery as occurred (which did not include the deposition of the Secretary himself). We accordingly review the District Court's ruling on pretext in light of all the evidence in the record before the court, including the extra-record discovery.

That evidence showed that the Secretary was determined to reinstate a citizenship question

from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court's view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question "well before" receiving DOJ's request, and did so for reasons unknown but unrelated to the VRA.

The Government, on the other hand, contends that there was nothing objectionable or even surprising in this. And we agree—to a point. It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. The record here reflects the sometimes involved nature of Executive Branch decisionmaking, but no particular step in the process stands out as inappropriate or defective.

And yet, viewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. . . .

. . . [U]nlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

. . . Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (CA2 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. . . . We do not hold that the agency decision here was substantively invalid. But . . . [r]easoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction. . . .

JUSTICE THOMAS, with whom JUSTICE GORSUCH and JUSTICE KAVANAUGH join, concurring in part and dissenting in part.

[Justice Thomas concurred in the majority's holding that the decision to include a citizenship question on the census questionnaire was not substantively invalid, but dissented from the majority's holding that the explanation for that decision was inadequate, stating:]

The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. . . .

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and dissenting in part.

. . . I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire and that a remand to the agency is appropriate on that ground. But I write separately because I also believe that the Secretary's decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA). . . .

JUSTICE ALITO, concurring in part and dissenting in part.

[Justice Alito concluded that the Secretary's decision was unreviewable because it was "committed to agency discretion by law" under APA § 701(a)(2).]

p. 785:

After the first sentence of the first paragraph, please add this citation:

See, *e.g.*, *Transp. Div. of Int'l Sheet Metal Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1178–1179 (9th Cir. 2021) (interpreting *Dep't of Commerce v. New York* to entail "four steps for reviewing whether an agency's stated reasons for taking action are pretextual").

p. 786:

Please add the following after the exercise on p. 786.

4. Department of Homeland Security v. Regents of the University of California

Department of Homeland Security v. Regents of the University of California

140 S. Ct. 1891 (2020)

[Editor's summary: In 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. The program allowed certain aliens who entered the United States without lawful authorization while they were children to stay in the United States; this forbearance from being removed from the United States is known as deferred action. DHS encouraged people to apply for deferred action under DACA. For an application to be granted, the applicant had to meet certain criteria, such as having refrained from serious crime, that made him or her "low priority" for removal. Successful applicants got individualized determinations granting them deferred action for renewable periods of three years. They also qualified for work authorization and for Social Security and Medicare benefits. DHS announced DACA in a 2012 memo that was published without any prior public notice or opportunity to comment.

In 2014, DHS issued another memo. It relaxed the eligibility requirements of DACA and created a deferred action program for aliens who were unlawfully present in the United States but whose children were U.S. citizens or lawful permanent residents. The new program was known as DA***P***A (Deferred Action for Parents of Americans and Lawful Permanent Residents).

Twenty-six States, led by Texas, got a nationwide preliminary injunction preventing implementation of the 2014 "DAPA Memorandum." The Fifth Circuit affirmed the preliminary injunction on two grounds. It held, first, that the plaintiffs were likely to succeed in their claim that the memo was a substantive, legislative rule that was procedurally invalid because of DHS's failure to follow the federal APA's notice-and-comment procedures. Second, the Fifth Circuit held that the APA required DAPA to be set aside as "contrary to law" because it was "manifestly contrary

to" the Immigration and Nationality Act (INA). An equally divided Court affirmed the Fifth Circuit's decision. *United States v. Texas*, 136 S. Ct. 2271 (2016) (*per curiam*). The DAPA Memorandum was never implemented before DHS rescinded it in June 2017, after a change in presidential administration.

In September 2017, the U.S. Attorney General, Jeff Sessions, sent a letter to Acting DHS Secretary Elaine Duke advising her that DHS should rescind DACA as well. General Sessions' letter said that DACA had the "same legal . . . defects" as DAPA. Rather than outright rescission, however, General Sessions' letter urged DHS to "consider an orderly and efficient wind-down process." The day after getting the letter, Acting DHS Secretary Duke issued a memo stating that DACA "should be terminated" based on the decisions in the DAPA litigation and General Sessions' letter. The Duke memo provided for a winding down of the program rather than an immediate revocation of all grants of the deferred action status that, by then, gone to about 700,000 DACA recipients.

The rescission of DACA was challenged in lawsuits brought in three different federal district courts by, among other plaintiffs, the Regents of the University of California, the National Association for the Advancement of Colored People, and individual DACA recipients. The suits alleged, among other claims, that DACA's rescission violated the APA and the equal protection guarantee of the Fifth Amendment. In one of the suits, the district court granted partial summary judgment in favor of the plaintiffs (who are respondents in the U.S. Supreme Court), holding that Acting Secretary Duke's explanation for the rescission was inadequate. The district court stayed its order, however, to permit Duke's successor, Secretary Kirstjen Nielsen, to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority."

In response, Secretary Nielsen issued a memorandum giving three reasons why she believed "the decision to rescind the DACA policy was, and remains, sound." First, she agreed with the Attorney General that DACA was contrary to law. Second, she said that, in any event, DACA was "legally questionable" and on that ground along should be rescinded. Third, she cited several policy reasons for rescission, including that (1) class-based immigration relief should be granted by Congress, rather than through executive non-enforcement; (2) DHS should exercise prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) DHS should send a public message that the immigration laws would be enforced against all classes and categories of aliens. The Nielsen memo, unlike the Duke memo, acknowledged "asserted reliance interests" in DACA's continuation but determined that they did not "outweigh" the reasons supporting rescission.

The district court to which the Nielsen memo was addressed held that its explanation for rescission was inadequate. That court and the other two district courts ruled against DHS. DHS appealed to three separate federal circuits. After one of those circuits, the Ninth, affirmed the ruling against DHS, the Court granted certiorari in all three cases and consolidated them.]

. . . The issues raised here are (1) whether the APA claims are reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.

II

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so. . . . [The Court explained the "reasoned decision making" requirement imposed by the APA's "arbitrary and capricious" standard of judicial review.]

But before determining whether the rescission was arbitrary and capricious, we must first address the Government's contentions that DHS's decision is unreviewable under the APA and outside this Court's jurisdiction.

A

[DHS argued that the decision to rescind DACA was unreviewable under the APA. Relying on *Heckler v. Chaney*, 470 U.S. 821 (1985), DHS likened DACA to an agency's decision not to undertake enforcement action, a decision that is presumptively "committed to agency discretion by law" and therefore unreviewable under APA § 701(a)(2). DHS reasoned that just as a policy of not taking enforcement action is unreviewable, so is the rescission of that policy. The Court rejected that argument, holding that "the DACA program is more than a non-enforcement policy." For one thing, under DACA, DHS adjudicated individual applications for DACA status and determined whether or not to take an "affirmative act" by approving DACA status. This was more than just passive refusal to taken enforcement action. For another thing, "[t]he benefits attendant to deferred action [in the form of eligibility to work and to get government benefits] provide further confirmation" that DACA is not just a non-enforcement policy. The Court concluded that DACA's rescission "is subject to review under the APA."]

B

[DHS also argued that judicial review was barred by two jurisdictional provisions in the INA. The Court rejected that argument as well.]

III

A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency's explanation. [DHS argued that the Court should consider not only Acting Secretary Duke's memo announcing the rescission in September 2017 but also the memo submitted by Secretary Neilsen nine months later in response to the district court's invitation to provide a fuller explanation. The Court rejected that argument.]

It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." [Citation omitted.] If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer "a fuller explanation of the agency's reasoning at the time of the agency action." [Citations omitted.] This route has important limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may elaborate later on that reason (or reasons) but may not provide new ones. *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (*per curiam*). Alternatively, the agency can "deal with the problem afresh" by taking new agency action. *SEC v. Chenery Corp*., 332 U.S. 194, 201 (1947). . . . An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

[The Court determined that DHS took the first route by purporting to elaborate on Acting Secretary Duke's original rationale for rescission. The problem was, Secretary Neilsen's memorandum cited reasons that weren't in Acting Secretary Duke's memo. So it was more than merely an elaboration, yet it was not "deal[ing] with the problem afresh" by taking new action. It was therefore illegitimate, and the Court accordingly considered only Acting Secretary Duke's original explanation for rescinding DACA.] . . . The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. . . .

B

We turn, finally, to whether DHS's decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke's justification for the rescission was succinct: "Taking into consideration" the Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason, she concluded—without elaboration—that the "DACA program should be terminated."

[Respondents renew the argument that prevailed in the lower courts: namely, that "the Duke Memorandum does not adequately explain the conclusion that DACA is unlawful, and that this conclusion is, in any event, wrong." The Court declined to address that argument because the legality of DACA was, by statute, a matter for the Attorney General, *not* the DHS Secretary, to decide, and the present cases challenged only the DHS Secretary's decision. Accordingly, the Court was not convinced that the cases before it were "proper vehicles for" addressing whether or not DACA was lawful. In short, the Court ducked that question.]

. . . Instead we focus our attention on respondents' . . . argument . . . that Acting Secretary Duke "failed to consider … important aspect[s] of the problem" before her. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983).

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. . . .

But Duke did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General's legal reasoning left off. The Attorney General concluded that "the DACA policy has the same legal . . . defects that the courts recognized as to DAPA." App. 878. So, to understand those defects, we look to the Fifth Circuit, the highest court to offer a reasoned opinion on the legality of DAPA. That court described the "core" issue before it as the "Secretary's decision" to grant "eligibility for benefits"—including work authorization, Social Security, and Medicare—to unauthorized aliens on "a class-wide basis." [Citations omitted.] The Fifth Circuit's focus on these benefits was central to every stage of its analysis. . . .

But there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision). And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. As it explained, the "challenged portion of DAPA's deferred-action program" was the

decision to make DAPA recipients eligible for benefits. [Citation omitted.] . . . [T]he Fifth Circuit observed that "the states do not challenge the Secretary's decision to 'decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.'" [Citations omitted.] And the Fifth Circuit underscored that nothing in its decision or the preliminary injunction "requires the Secretary to remove any alien or to alter" the Secretary's class-based "enforcement priorities." [Citation omitted.] In other words, the Secretary's forbearance authority was unimpaired.

. . . Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." 116 Stat. 2178, 6 U.S.C. § 202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation. . . .

. . . [T]he rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke "entirely failed to consider [that] important aspect of the problem." *State Farm*, 463 U.S. at 43.

That omission alone renders Acting Secretary Duke's decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). When an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, . . . 136 S. Ct. 2117, 2126 (2016) (quoting [*FCC v.*] *Fox Television*, 556 U.S. [502, 515 (2009)]). "It would be arbitrary and capricious to ignore such matters." *Id.*, at 515. Yet that is what the Duke Memorandum did.

. . . To the Government and lead dissent's point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it. . . .

IV

[The Court held that respondents failed to state a viable claim of an equal protection violation, because their allegations did not "raise a plausible inference that an invidious discriminatory purpose"—namely, hostility toward Hispanics—"was a motivating factor."]

* * *

. . . The appropriate recourse is . . . to remand to DHS so that it may consider the problem anew.

[There were four separate opinions concurring in part and dissenting in part. Justice Sotomayor agreed that DACA's rescission violated the APA but would have allowed respondents a chance on remand to develop their equal protection claim. Justice Thomas, joined by Justices

Alito and Gorsuch, agreed that respondents failed to state a viable equal protection claim but disagreed that the rescission violated the APA. Justice Alito wrote to emphasize his view that the federal courts had delayed the implementation of DACA's rescission for almost an entire presidential term "without holding that DACA cannot be rescinded." Justice Kavanaugh's separate opinion argued that the majority should have considered the Nielsen memo.]

Exercise: *Department of Homeland Security* Revisited

The majority cites the following cases that we cited or discussed (or both) earlier in the course book:

- *Heckler v. Chaney*, 470 U.S. 821 (1985)
- *Camp v. Pitts*, 411 U.S. 138 (1973)
- *SEC v. Chenery Corp*., 332 U.S. 194 (1947)
- *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29 (1983)
- *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016)
- *FCC v. Fox Television Stations*, 556 U.S. 502 (2009)

Please review these cases and explain in your own words how their principles affected the analysis in this case. The objective of this exercise is to have you use the Court's decision as a chance to review several fundamental principles of federal administrative law.

Chapter 34

34. The *Chevron* Doctrine and State Counterparts

B. Federal Agencies' Interpretation of Statutes They Administer

p. 793:

In the first full paragraph, please replace the first sentence's citation of *King v. Burwell* with this one:

West Virginia v. EPA, 142 S. Ct. 2587 (2022).

On the same page, please replace the fourth bullet point, which refers to *King*, with this one:

- In *West Virginia. v. EPA*, the Court reviewed the EPA's interpretation of the Clean Air Act, an interpretation expressed in a rule known as the "Clean Power Plan."

p. 812:

In the third full paragraph, please replace the sentence that occurs about two-thirds of the way into the paragraph, and that begins "There is one exception . . .," with this sentence:

There is one exception, however, which was established in the fourth and final key case on the *Chevron* doctrine, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

pp. 813–816:

Please replace all of subsection 4, *except* the Exercise on p. 816, with this new subsection:

4. West Virginia v. EPA

In *West Virginia v. EPA*, the Court held that courts shouldn't give *Chevron* deference to agency interpretations of some unusually important issues of statutory interpretations. In reading the opinion, please try to figure out when, and why, an important question of statutory interpretation disqualifies an agency interpretation for Chevron deference.

West Virginia v. Environmental Protection Agency

142 S. Ct. 2587 (2022)

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, AND BARRETT, JJ., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. KAGAN, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air. 42 U. S. C. § 7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. §§ 7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

I

A

The Clean Air Act establishes three main regulatory programs to control air pollution from stationary sources such as power plants. One program is the New Source Performance Standards program of Section 111, at issue here. The other two are the National Ambient Air Quality Standards (NAAQS) program, set out in Sections 108 through 110 of the Act, and the Hazardous Air Pollutants (HAP) program, set out in Section 112. To understand the place and function of Section 111 in the statutory scheme, some background on the other two programs is in order.

The NAAQS program addresses air pollutants that "may reasonably be anticipated to endanger public health or welfare," and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." § 7408(a)(1). After identifying such pollutants,

EPA establishes a NAAQS for each. The NAAQS represents "the maximum airborne concentration of [the] pollutant that the public health can tolerate." *Whitman v. American Trucking Assns., Inc*., 531 U.S. 457, 465 (2001). EPA, though, does not choose which sources must reduce their pollution and by how much to meet the ambient pollution target. Instead, Section 110 of the Act leaves that task in the first instance to the States, requiring each to submit to [EPA] a plan designed to implement and maintain such standards within its boundaries.

The second major program governing stationary sources is the HAP program. The HAP program primarily targets pollutants, other than those already covered by a NAAQS, that present "a threat of adverse human health effects," including substances known or anticipated to be "carcinogenic, mutagenic, teratogenic, neurotoxic," or otherwise "acutely or chronically toxic." § 7412(b)(2).

EPA's regulatory role with respect to these toxic pollutants is different in kind from its role in administering the NAAQS program. There, EPA is generally limited to determining the maximum safe amount of covered pollutants in the air. As to each hazardous [i.*e.*, toxic] pollutant, by contrast, the Agency must promulgate emissions standards for both new and existing major sources [under Section 112]. Those standards must "require the maximum degree of reduction in emissions ... that the [EPA] Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable ... through application of measures, processes, methods, systems or techniques" of emission reduction. § 7412(d)(2). In other words, EPA must directly require all covered sources to reduce their emissions to a certain level.

Thus, in the parlance of environmental law, Section 112 directs the Agency to impose "technology-based standard[s] for hazardous emissions." Such "technologies" are not limited to literal technology, such as scrubbers; "changes in the design and operation" of the facility, or "in the way that employees perform their tasks," are also available options.

The third air pollution control scheme is the New Source Performance Standards program of Section 111. § 7411. That section directs EPA to list "categories of stationary sources" that it determines "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). Under Section 111(b), the Agency must then promulgate for each category "Federal standards of performance for new sources," § 7411(b)(1)(B). A "standard of performance" is one that "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." § 7411(a)(1).

Thus, [Section 111] directs EPA to (1) "determine[ ]," taking into account various factors, the "best system of emission reduction which ... has been adequately demonstrated," (2) ascertain the "degree of emission limitation achievable through the application" of that system, and (3) impose an emissions limit on new stationary sources that "reflects" that amount. *Ibid*.; see also 80 Fed. Reg. 64538 (2015). Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount "achievable through the

application of the best system of emission reduction ... adequately demonstrated," or the BSER. § 7411(a)(1); see § 7411(b)(5). EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category.

Although the thrust of Section 111 focuses on emissions limits for new and modified sources—as its title indicates—the statute also authorizes regulation of certain pollutants from existing sources. Under Section 111(d), once EPA "has set new source standards addressing emissions of a particular pollutant under ... section 111(b)," 80 Fed. Reg. 64711, it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or HAP programs. Existing power plants, for example, emit many pollutants covered by a NAAQS or HAP standard. Section 111(d) thus "operates as a gap-filler," empowering EPA to regulate harmful emissions not already controlled under the Agency's other authorities.

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, "the best system of emission reduction ... that has been adequately demonstrated for [existing covered] facilities." 40 CFR § 60.22(b)(5) (2021). The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA.

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. See 80 Fed. Reg. 64703, and n. 275 (past regulations pertained to "four pollutants from five source categories"). It was thus only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an "obscure, never-used section of the law." Hearings on S. 300 et al. before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works, 100th Cong., 1st Sess., 13 (1987) (remarks of Sen. Durenberger).

B

Things changed in October 2015, when EPA promulgated two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). Both were premised on the Agency's earlier finding that carbon dioxide is an "air pollutant" that "may reasonably be anticipated to endanger public health or welfare" by causing climate change. 80 Fed. Reg. 64530. Carbon dioxide is not subject to a NAAQS and has not been listed as a hazardous pollutant.

The first rule announced by EPA established federal carbon emissions limits for new power plants of two varieties: fossil-fuel-fired electric steam generating units (mostly coal fired) and natural-gas-fired stationary combustion turbines. *Id*., at 64512.

The second rule was triggered by the first: Because EPA was now regulating carbon dioxide from *new* coal and gas plants, Section 111(d) required EPA to also address carbon emissions from *existing* coal and gas plants. It did so through what it called the Clean Power Plan

rule.

In that rule, EPA established "final emission guidelines for states to follow in developing plans" to regulate existing power plants within their borders. *Id*., at 64662. To arrive at the guideline limits, EPA did the same thing it does when imposing federal regulations on new sources: It identified the BSER.

The BSER that the Agency selected for *existing* coal-fired power plants, however, was quite different from the BSER it had chosen for new sources. The BSER for existing plants included three types of measures, which the Agency called "building blocks." *Id*., at 64667. The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal more efficiently. *Id*., at 64727. But such improvements, EPA stated, would "lead to only small emission reductions," because coal-fired power plants were already operating near optimum efficiency. *Ibid*. On the Agency's view, "much larger emission reductions [were] needed from [coal-fired plants] to address climate change." *Ibid*.

So the Agency included two additional building blocks in its BSER, both of which involve what it called "generation shifting from higher-emitting to lower-emitting" producers of electricity. *Id*., at 64728. Building block two was a shift in electricity production from existing coal-fired power plants to natural-gas-fired plants. *Ibid*. Because natural gas plants produce "typically less than half as much" carbon dioxide per unit of electricity created as coal-fired plants, the Agency explained, "this generation shift [would] reduce[] CO2 emissions." *Ibid*. Building block three worked the same way, except that the shift was from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," mainly wind and solar. *Id*., at 64729, 64748. "Most of the CO2 controls" in the rule came from the application of building blocks two and three. *Id*., at 64728.

The Agency identified three ways in which a regulated plant operator could implement a shift in generation to cleaner sources. *Id*., at 64731. First, an operator could simply reduce the regulated plant's own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there. *Ibid*. Finally, operators could purchase emission allowances or credits as part of a cap-and-trade regime. *Id*., at 64731–64732. Under such a scheme, sources that achieve a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps.

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. *Id*., at 64731. Given the integrated nature of the power grid, "adding electricity to the grid from one generator will result in the instantaneous reduction in generation from other generators," and "reductions in generation from one generator lead to the instantaneous increase in generation" by others. *Id*., at 64769. So coal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas.

Having decided that the "best system of emission reduction ... adequately demonstrated" was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA

then set about determining "the degree of emission limitation achievable through the application" of that system. 42 U. S. C. § 7411(a)(1). [I]n translating the BSER into an operational emissions limit, EPA could choose whether to require anything from a little generation shifting to a great deal. The Agency settled on what it regarded as a "reasonable" amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. *Id*., at 64797–64811. Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014.

The point . . . was to compel the transfer of power generating capacity from existing sources to wind and solar. The White House stated that the Clean Power Plan would "drive a[n] ... aggressive transformation in the domestic energy industry." White House Fact Sheet. EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule (2015). The Energy Information Administration reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040. Dept. of Energy, Analysis of the Impacts of the Clean Power Plan (May 2015).

C

These projections were never tested, because the Clean Power Plan never went into effect. [The rule was stayed by federal courts until President Donald Trump came into office, at which point the EPA repealed the Clean Power Plan and replaced it with a different rule, known as the "ACE Rule," which did not rely on shifting energy production to wind and solar.]

D . . .

[Procedural history omitted.]

II

[In this part of the opinion, the Court held that one group of plaintiffs, the States, have standing to challenge the Trump Administration's repeal of the Clean Power Plan.]

III

A

In devising emissions limits for power plants, EPA first "determines" the "best system of emission reduction" that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated." 42 U. S. C. § 7411(a)(1). The Agency then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. *Ibid*.; see also 80 Fed. Reg. 64719. The BSER, therefore, "is the central determination that the EPA must make in formulating [its emission] guidelines" under Section 111. *Id*., at 64723. The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the "best system of emission reduction" within the meaning of Section 111.

[Federal courts generally interpret a statute by focusing on its *text*, understood in context. This textualist approach has a somewhat different focus, however, when the issue is whether a federal statute grants authority to a federal agency to take a particular action. Then the focus is more on whether Congress *intended* to confer the power that the agency asserted in taking the action. This shift in focus from text to legislative intent usually has little practical effect on a court's interpretive approach.] Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159–60 (2000).

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." In *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S.Ct. 2485, 2487 (2021) (per curiam), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the ... spread of " disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so.

Our decision in *Utility Air [Regulatory Group v. EPA*, 573 U.S. 302 (2014),] addressed . . . whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." *Id*., at 324. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), we confronted the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them "inconsistent with the public interest," 21 U. S. C. § 823(f). We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable." 546 U.S. at 267. Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration's mandate that "84 million Americans ... either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense." *National Federation of Independent Business v. Occupational Safety and Health Administration*, 142 S.Ct. 661, 665 (2022) (per curiam). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure.

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, *Brown & Williamson*, 529 U.S. at 133, made

it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*, 531 U.S. at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *Utility Air*, 573 U.S. at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.

The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation," *post*, at ——, —— (opinion of KAGAN, J.). But in what the dissent calls the "key case" in this area, *Brown & Williamson*, post, at ——, the Court could not have been clearer: "In extraordinary cases . . . there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. 529 U.S. at 159. Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." *Utility Air*, 573 U.S. at 324, The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear congressional authorization," *ibid.*—confirms that the approach under the major questions doctrine is distinct.

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air*, 573 U.S. at 324. It located that newfound power in the vague language of an "ancillary provision[ ]" of the Act, *Whitman*, 531 U.S. at 468, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*, 529 U.S. at 159–160; *Gonzales,* 546 U.S. at 267–268; *Alabama Assn*., 141 S.Ct., at 2486–2487, 2490. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U.S. at 159–160.

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." 80 Fed. Reg. 64726.

The Government quibbles with this description of the history of Section 111(d), pointing

to one rule that it says relied upon a cap-and-trade mechanism to reduce emissions. See 70 Fed. Reg. 28616 (2005) (Mercury Rule). The legality of that choice was controversial at the time and was never addressed by a court. Even assuming the Rule was valid, though, it still does not help the Government. In that regulation, EPA set the actual "emission cap"—i.e., the limit on emissions that sources would be required to meet—"based on the level of [mercury] emissions reductions that w[ould] be achievable by" the use of "technologies [that could be] installed and operational on a nationwide basis" in the relevant timeframe—namely, wet scrubbers. 70 Fed. Reg. 28620–28621. In other words, EPA set the cap based on the application of particular controls, and regulated sources could have complied by installing them. By contrast, and by design, there is no control a coal plant operator can deploy to attain the emissions limits established by the Clean Power Plan. See *supra*, at ——. The Mercury Rule, therefore, is no precedent for the Clean Power Plan. To the contrary, it was one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source.

[Here,] the [EPA] explained, in order to "control[ ] CO2 from affected [plants] at levels . . . necessary to mitigate the dangers presented by climate change," it could not base the emissions limit on "measures that improve efficiency at the power plants." [80 Fed. Reg.] at 64728. "The quantity of emissions reductions resulting from the application of these measures" would have been "too small." *Id*., at 64727. Instead, to attain the necessary "critical CO2 reductions," EPA adopted what it called a "broader, forward-thinking approach to the design" of Section 111 regulations. *Id*., at 64703. Rather than focus on improving the performance of individual sources, it would "improve the *overall power system* by lowering the carbon intensity of power generation." *Ibid*. (emphasis added). And it would do that by forcing a shift throughout the power grid from one type of energy source to another. In the words of the then-EPA Administrator, the rule was "not about pollution control" so much as it was "an investment opportunity" for States, especially "investments in renewables and clean energy." Oversight Hearing on EPA's Proposed Carbon Pollution Standards for Existing Power Plants before the Senate Committee on Environment and Public Works, 113th Cong., 2d Sess., p. 33 (2014).

This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation" into an entirely different kind. *MCI*, 512 U.S. at 231. Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under its newly "discover[ed]" authority, *Utility Air*, 573 U.S. at 324, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to "shift" away virtually all of their generation—i.e., to cease making power altogether.

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise not traditionally needed in EPA regulatory development." EPA, Fiscal Year 2016: Justification of Appropriation Estimates for the Committee on Appropriations 213 (2015) (emphasis added). "When [an] agency has no comparative expertise" in making certain

policy judgments, we have said, "Congress presumably would not" task it with doing so. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 (2019).

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal-based generation there should be over the coming decades. The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d).

C

Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U.S. at 324, 134 S.Ct. 2427.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." 42 U. S. C. § 7411(a)(1). As a matter of definitional possibilities, generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction," Brief for Federal Respondents 31—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

* * *

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

Justice GORSUCH, with whom Justice ALITO joins, concurring.

To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to "clear congressional authorization" when they claim the power to make decisions of vast "economic and political significance." *Ante*, at ——, ——. Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees.

The major questions doctrine works . . . to protect the Constitution's separation of powers. *Ante*, at ——. In Article I, "the People" vested "[a]ll" federal "legislative powers ... in Congress." Preamble; Art. I, § 1. As Chief Justice Marshall put it, this means that "important subjects . . . must

be entirely regulated by the legislature itself," even if Congress may leave the Executive "to act under such general provisions to fill up the details." Wayman v. Southard, 10 Wheat. 1, 42–43, 6 L.Ed. 253 (1825). [T]he Constitution's rule vesting federal legislative power in Congress is "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). . . .

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to "the most pressing environmental challenge of our time." *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

Congress charged EPA with addressing those potentially catastrophic harms, including through regulation of fossil-fuel-fired power plants. Section 111 of the Clean Air Act directs EPA to regulate stationary sources of any substance that "causes, or contributes significantly to, air pollution" and that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Carbon dioxide and other greenhouse gases fit that description. See *American Elec. Power [v. Connecticut]*, 564 U.S. [410, 417 (2011)]. EPA thus serves as the Nation's "primary regulator of greenhouse gas emissions." *American Elec. Power*, 564 U.S. at 428. And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are responsible for about one quarter of the Nation's greenhouse gas emissions.

To carry out its Section 111 responsibility, EPA issued the Clean Power Plan in 2015. The premise of the Plan—which no one really disputes—was that operational improvements at the individual-plant level would either "lead to only small emission reductions" or would cost far more than a readily available regulatory alternative. 80 Fed. Reg. 64727–64728 (2015). That alternative—which fossil-fuel-fired plants were "already using to reduce their [carbon dioxide] emissions" in "a cost effective manner"—is called generation shifting. *Id*., at 64728, 64769. As the Court explains, the term refers to ways of shifting electricity generation from higher emitting sources to lower emitting ones—more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind. See *ante*, at ——. A power company (like the many supporting EPA here) might divert its own resources to a cleaner source, or might participate in a cap-and-trade system with other companies to achieve the same emissions-reduction goals.

The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. *Ante*, at ——. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. § 7411(a)(1). The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute. The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is

wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.

[Although the Court has often said it interprets statutes based on their text,] [w]hen that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence.

[The dissent argues that, since the founding, Congress has delegated broad policy-making power to executive branch agencies and officials, and that these broad delegations raise no constitutional concerns.]

Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines.

[T]he Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent. . . .

* * *

West Virginia v. EPA applied *Chevron* step zero in refusing to give *Chevron* deference to the EPA's statutory interpretation. Step zero requires a determination of whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–227. Congress did delegate to the EPA broad authority in § 111(d) of the Clean Air Act to prescribe regulations establishing standards of performance for existing sources. *See* 42 U.S.C. § 7411(d). And the EPA relied on this delegation to make the Clean Power Plan. But that reliance was misplaced, the Court determined. The EPA's interpretation did not qualify for *Chevron* deference because, despite the statutory grant of rulemaking power in § 111(d), that provision didn't grant power to authorize a generation-shifting approach. That approach was outside the scope of the delegation.

Why? Apparently because the EPA (1) "claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority"; (2) the statutory provision was "ancillary" and its language was "vague"; and (3) EPA's "discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." Also relevant—as the Court explained in a portion of the opinion that is not included in the excerpt above—is that the question posed by the EPA's claim of authority had "deep economic and political significance." *West Virginia v. EPA*, 142 S. Ct. at 2626. And of potential relevance is that the EPA had disclaimed expertise in formulating energy policy. At this point, the Court has not clarified which, if any, of these factors is required to apply the major questions doctrine.

What is the result of concluding that the major questions doctrine applies? In that situation, the Court says, the court must harbor "skepticism" toward the agency's claim of authority. "To overcome that skepticism," the agency must point to "clear congressional authorization" for the agency's action. Justice Gorsuch describes this as a "clear-statement rule" in his concurrence. He says it protects the separation of power. But Justice Kagan says it evinces an "anti-administrative-state stance." Which is true? That is for you to decide.

In any event, *West Virginia v. EPA* teaches us to be careful about this statement in *Mead*: "[A] very good indicator of delegation meriting Chevron treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed." 533 U.S. at 229. *West Virginia v. EPA* shows that, in certain "extraordinary cases," even a broad grant of rulemaking power may not delegate power to address unusually important questions of statutory interpretation raised by agency claims of authority that have deep political and economic significance, especially ones as to which the agency lacks expertise. More broadly, *West Virginia v. EPA* might show discomfort on the Court with *Chevron* deference because of the way it undermines the courts' responsibility for "saying what the law is." *See*, *e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (expressing concern about "the way in which" *Chevron* "has come to be understood and applied"); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("Whether *Chevron* should remain is a question we may leave for another day").

Further evidence of discomfort is the Court's grant of certiorari in *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2365 (2023). The case concerns a rule of the National Marine Fisheries Service. The rule requires fishing boats to carry, onboard their boats, federal observers whose job is to monitor the boats' compliance with federal regulations; the rule also requires boat owners to pay the federal observers' salaries. The D.C. Circuit upheld the rule, according it deference under *Chevron*. *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 368–70 (D.C. Cir. 2020). The Court granted certiorari limited to this question:

> "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Pet. for Cert. i–ii, *Loper Bright*.

Stay tuned to learn whether *Chevron* has run out of gas!

End of Supplement